SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. [redacted] 59

DONALD SOMERVILLE and
MARJORIE KULLERSTRAND,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ of Certiorari To The Appellate Court of Illinois, First District.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statutory And Constitutional Provisions

Illinois Constitution, Article 2, Section 10:

No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

Ill. Rev. Stat. ch. 38, Sections 3-3, 3-4:

3-3 Multiple Prosecutions for Same Act:

(a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.

(b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (c), if they are based on the same act.

(c) When 2 or more offenses are charged as required by Subsection (b), the court in the interest of justice may order that one or more of such charges shall be tried separately.

3-4. Effect of Former Prosecution:

A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution:

(1) Resulted in either a conviction or an acquittal or in a determination that the evidence was insufficient to warrant a conviction; or

(2) Was terminated by a final order or judgment, even if entered before trial, which required a determination inconsistent with any fact or legal proposition necessary to a conviction in the subsequent prosecution; or

(3) Was terminated improperly after the jury was impaneled and sworn or, in a trial before a court without a jury, after the first witness was sworn but

before findings were rendered by the trier of facts, or after a plea of guilty was accepted by the court.

A conviction of an included offense is an acquittal of the offense charged.

(b) A prosecution is barred if the defendant was formerly prosecuted for a different offense, or for the same offense based upon different facts, if such former prosecution:

(1) Resulted in either a conviction or an acquittal, and the subsequent prosecution is for an offense of which the defendant could have been convicted on the former prosecution; or was for an offense with which the defendant should have been charged on the former prosecution, as provided in Section 3-3 of this Code (unless the court ordered a separate trial of such charge); or was for an offense which involves the same conduct, unless each prosecution requires proof of a fact not required on the other prosecution, or the offense was not consummated when the former trial began; or

(2) Was terminated by a final order or judgment, even if entered before trial, which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution; or

(3) Was terminated improperly under the circumstances stated in Subsection (a), and the subsequent prosecution is for an offense of which the defendant could have been convicted if the former prosecution had not been terminated improperly.

(c) A prosecution is barred if the defendant was formerly prosecuted in a District Court of the United States or in a sister State for an offense which is within the con-

current jurisdiction of this State, if such former prosecution:

(1) Resulted in either a conviction or an acquittal, and the subsequent prosecution is for the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution, or the offense was not consummated when the former trial began; or

(3) Was terminated by a final order of judgment, even if entered before trial, which required a determination inconsistent with any fact necessary to a conviction in this State.

(d) However, a prosecution is not barred within the meaning of this Section 3-4 if the former prosecution:

(1) Was before a court which lacked jurisdiction over the defendant or the offense; or

(2) Was procured by the defendant without the knowledge of the proper prosecuting officer, and with the purpose of avoiding the sentence which otherwise might be imposed; or if subsequent proceedings resulted in the invalidation, setting aside, reversal, or vacating of the conviction, unless the defendant was thereby adjudged not guilty.

STATEMENT DENYING PETITIONER'S JURISDICTIONAL ALLEGATION

The Petitioners seek, by writ of certiorari, review of a final state court decision rendered by the Illinois Appellate Court.[1] No federal title, right, privilege, or immu-

1. 88 Ill. App. 2d 212, 232 N.E. 2d 115 (196).

nity was asserted before the Appellate Court. Neither Petitioners' brief nor the Court's opinion mentioned the Fifth or Fourteenth Amendments.[2] Reversal was sought because of purported errors of the trial court in applying state law. The Petitioners, therefore, have improperly invoked Title 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

The federal question raised by the petition is whether the Due Process Clause of the Fourteenth Amendment forbids retrial of a state court defendant under a valid indictment after his first trial has been terminated, before any evidence has been heard, because of an indictment so defective as to prevent the state from securing a valid conviction.

REASONS FOR DENYING WRIT

I.

NO WIDELY APPLICABLE RULE COULD EMERGE FROM A CONSIDERATION OF THIS CASE.

In the present case because of an invalid indictment a mistrial was declared after a jury had been impaneled but

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2. Nor had the federal right allegedly violated been asserted in the trial court. It is of no legal significance that the Illinois Supreme Court, in its discretion, denied a petition for leave to appeal. Cf. Beck v. Washington, 369 U.S. 541, 550 (1962) and Ferguson v. Georgia, 365 U.S. 570, 572 n. 1 (1961). The Illinois high court does not grant leave to appeal from Appellate Court decisions to hear claims which petitioners simply did not bother to raise in the Appellate Court. See Ill. Rev. Stat. ch. 110A § 315, 317 (1967). At any rate, for purposes of § 1257 (3) the final state court decision for which the writ is sought is the decision of the Appellate Court.

before any evidence had been heard. This rare combination of circumstances has occurred in no other reported Illinois case [3] and in very few federal cases.[4] It is, therefore, apparent that review of the Illinois Appellate Court's decision could not yield a rule of broad applicability.

II.

A FOURTEENTH AMENDMENT PROHIBITION AGAINST DOUBLE JEOPARDY WOULD ADD LITTLE TO THE PROTECTIONS ALREADY AFFORDED STATE COURT DEFENDANTS. RECONSIDERATION OF PALKO V. CONNECTICUT WOULD, THEREFORE, CONSTITUTE AN UNWISE AND AN UNNECESSARY ATTACK UPON THE CONCEPT OF FEDERALISM.

If this Court, exceeding its jurisdictional grant and reaching the federal question not presented to the Illinois Appellate Court, should hold, by way of dictum,[5] that the Fifth Amendment prohibition against double jeopardy is fully applicable to the states, it would not be adding any important new procedural safeguard to the rights already guaranteed to state court defendants. Only three states

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3. Petitioners themselves have deemed this a question "of first impression" in Illinois. Petition to Illinois Supreme Court for Leave to Appeal, 3.

4. The federal cases cited infra at III (B) nearly exhaust the occasions when circumstances even remotely resembling those of this case have occurred in the federal courts.

5. Because the federal concept of double jeopardy was not offended in the instant case [see infra III (B)], any attack upon Palko v. Connecticut, 302 U.S. 319 (1937), would be dictum.

have no constitutional prohibition against double jeopardy. Only a single rarely invoked Connecticut statute materially contravenes the federal notion of double jeopardy.[6]

There has been no showing that the federal rule as to double jeopardy is fairer or more generous than state guarantees. In 1961 the Illinois legislature, for instance, enacted a statute that provides far broader protection against double jeopardy than any the Fifth Amendment provides for federal court defendants.[7] Even a cursory reading of that statute indicates that Illinois prosecutors do not share with federal prosecutors the freedom to use more than one trial in seeking penalties for separate offenses that arose out of the same course of conduct. Likewise, the Illinois prohibition against trial of a citizen in Illinois after he has been in jeopardy for the same conduct before the courts of another sovereign is far in advance of any dictated by the Fifth Amendment. The purported abuses which this Court refused to condemn as a violation of Due process in Ciucci v. Illinois, 356 U.S. 571 (1958), and Bartkus v. Illinois, 359 U.S. 121 (1959), have been rendered unlikely to re-occur by the voluntary action of the Illinois legislature.

In comparison, consider the recent decision of this Court in United States v. Ewell, 383 U.S. 116 (1966), where the federal standard of double jeopardy was held not to have been violated. In that case, it became apparent that a prisoner had been held for two years under a conviction that was invalid because of a defective indictment. The government made no move to free him. The prisoner attacked the legality of his confinement but the

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6. Conn. Gen. Stat. § 54-96 (1960).

7. Ill. Rep. Stat. ch. 38, § 3-3, 3-4 (1967). See Points and Authorities, supra.

government was left free to prosecute him anew and to increase the number of the charges, without giving him any guarantee that he would be given credit for the time he had served under the invalid conviction.

In the instant case the only complaint of the petitioners is that because of an invalid indictment they were forced to go through the jury-selection process twice. We respectfully submit that the reason that the petitioners based their plea in the trial court solely upon the Illinois double jeopardy statute, and in the Appellate Court solely upon that statute and the Illinois Constitution, is that they correctly perceived that Illinois law as to double jeopardy is far more generous to defendants than is the Fifth Amendment standard.

Since a declaration that the Fifth Amendment double jeopardy prohibition is applicable to the States would add so little to the protections already afforded state court defendants, there is no reason to reconsider Palko v. Connecticut, 302 U.S. 319 (1937). On the contrary, the responsibility shown by Illinois and other states in increasing protections against double jeopardy without the compulsion of a federal rule demonstrates the wisdom of that decision. At the very least, Palko, without harming state court defendants, stands as a symbol of the insight of great jurists such as Cardozo and Frankfurter that the ultimate responsibility of improving state systems of criminal justice rests with the States themselves. This Court should not even consider overturning that decision.

III.

THE PETITION PRESENTS NO COLORABLE CONSTITUTIONAL CLAIM.

A. The Petitioners Were Not in Jeopardy During the First Proceeding.

The Illinois Appellate Court held that the petitioners had not been in jeopardy during the proceedings which ended in a mistrial because the indictment had failed to state an offense. This decision was in accord with well established state law: a theft-related complaint or indictment is fatally defective and can be attacked at any time when it fails to allege an intent to deprive or to defraud. People v. Billingsley, 67 Ill. App. 2d 292, 213 N.E. 2d 765 (1966); People v. Greene, —— Ill. App. 2d ——, 235 N.E. 2d 295 (1968).

The Appellate Court implicitly rejected the petitioners' argument, renewed in their petition for certiorari, that despite an indictment that alleged no offense they could confer jurisdiction upon the trial court by waiving the defect.[8] "The trial court is not authorized to convict a person who has not been charged with an offense." People v. Greene, 235 N.E. 2d at 296-97. Illinois courts have long held that "no waiver or consent of the defendant to a criminal prosecution or estoppel against him can confer jurisdiction or authorize his conviction in absence of an accusation charging him with a violation of criminal law."

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8. The argument that the defendant conferred jurisdiction upon the trial court, despite an indictment that charged no offense, by a general objection, without more, to the declaration of a mistrial (A. 24) is extraordinary when uttered by experienced defense counsel.

People v. Minto, 318 Ill. 293, 296 149 N.E. 241 (1925). Since no valid conviction would have been obtained under that indictment, and since the State's motion prevented the possibility of the Petitioners' ever spending a day in jail under the invalid indictment, even if defense counsel had been negligent, the Petitioners were never in jeopardy at their first trial. Their claim of double jeopardy is, therefore, illusory.

B. The Proceedings in this Case Were Consistent With the Fifth Amendment Protection Against Double Jeopardy.

The federal cases with facts most similar to those of the instant case make it clear that according to the Fifth Amendment standard the Petitioners were not placed twice in jeopardy of their liberty. In Wolkoff v. United States, 84 F. 2d 17 (6th Cir. 1936), a mistrial was declared, because of a defective indictment, after all the evidence had been heard but before a verdict had been rendered. Retrial was held not to constitute double jeopardy. In Haugen v. United States, 153 F. 2d 850 (9th Cir. 1946), a mistrial was declared, for the same reason, after the Government's opening statement. After retrial and conviction the Circuit Court affirmed, saying: "One is not in jeopardy because proceeded against under a purported indictment charging no offense." 153 F. 2d at 851.

United States v. Ball, 163 U.S. 662 (1896), is clearly distinguishable. There the Government used the jurisdiction of a faulty indictment to retry a defendant whom a jury had acquitted of murder. We respectfully suggest that the trial court in the present case would have ruled in accordance with Ball if the first trial had proceeded to an acquittal on the merits. Acquittal would have signified that the State had failed to prove at least one of the ma-

terial elements that had to be proved even under a valid indictment. For the second indictment required proof of everything required under the first, plus proof of an intent to deprive. The matter would have been res judicata as between the parties. The State would not have attacked—and would not have been permitted to attack—its own indictment in such a case.

C. Double Jeopardy Is Not A Concept Designed To Prevent the State From Bringing A Defendant To Trial.

Here the State, by a timely motion, sought to prevent a situation where the only possibilities were acquittal or an invalid conviction. The Petitioners, by objecting to a mistrial, sought to force a situation where they were never in jeopardy but, under the Ball decision, could win their freedom. When the Court decided against proceeding so senselessly, Petitioners raised a cry of double jeopardy, claiming that the mistrial was a bar to future prosecution. Due Process does not require so much. As this Court remarked in United States v. Ewell, 383 U.S. at 121, the purpose of the prohibition against double jeopardy is not to grant persons accused of crime "immunity because of legal error committed at a previous trial."

CONCLUSION

For the reasons stated we respectfully request that this Court deny a Writ of Certiorari to review the judgment of the Illinois Appellate Court entered in this case.

Respectfully submitted,

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